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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEFFREY I. PHEFFER et al.,

Plaintiffs and Respondents,

v.

STEVEN GEORGE ORR et al.,

Defendants and Appellants.

B162820

(Los Angeles County
Super. Ct. No. BC230953)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Andria K. Richey, Judge. Affirmed, and reversed, with directions.

Dennison, Bennett & Press and Stephen M. Press for Defendants and
Appellants.

Marcus, Watanabe, Snyder & Dave and David M. Marcus for Plaintiffs and
Respondents.

* * * * *

Steven and Susan Orr, individually and as trustees of the Orr living trust dated October 12, 1992 (referred to collectively as the Orrs), appeal from a judgment entered against them and in favor of Jeffrey and Annie Pheffer, as trustees of the Pheffer family revocable trust dated October 20, 1997 (the Pheffers), following a court trial. The parties own adjacent residential properties. The judgment orders the Orrs to remove certain encroachments onto the Pheffer property and to pay compensatory and punitive damages totaling approximately \$20,000. The Orrs contend: “[I.] No substantial evidence exists that Mr. Pheffer was put in imminent fear of harm at the alleged assault. [II.] Words alone cannot constitute a civil assault. [III.] If assault is not found, punitive damages related to Mr. Orr must be set aside. [IV.] The court’s order regarding the shed is beyond the scope of the pleadings. [V.] A prescriptive easement should have been granted to appellants for the small brick wall and chain link fence. [VI.] The small brick wall is a division fence.”

PROCEDURAL AND FACTUAL BACKGROUND

The complaint (Complaint) alleging quiet title, declaratory relief, trespass, nuisance, and permanent injunction was filed in June 2000. It asserts that the Orrs maintained encroachments over the common boundary including a small brick wall, an outbuilding (shed), a chain link fence, and concrete footings for a chicken wire fence. It also alleges that the Orrs had trespassed on the Pheffers’ property, poured concrete on their steps, and excessively pruned and trimmed trees and shrubs.

Before an answer was filed, the Pheffers filed a first amended complaint (FAC) for quiet title (count 1), declaratory relief (count 2), trespass (count 3), nuisance (count 4), statutory damage (Code Civ. Proc., § 733) (count 5), assault (count 6), and intentional infliction of emotional distress (count 7). The Pheffers sought injunctive relief. The FAC omitted allegations that the shed encroached on the Pheffers’ property. It added allegations that on November 11, 2000, Mr. Orr had placed a tree stump on the Pheffer property and, when Mr. Pheffer threw it onto the Orr driveway,

Mr. Orr had threatened Mr. Pheffer by saying that Mr. Pheffer “was dead,” that Mr. Orr was going to kill him, and that Mr. Pheffer was “going down.”

The Orrs answered the FAC, denying its allegations and alleging affirmative defenses including prescriptive easement rights.

The case was tried to the court. It found for the Pheffers on counts 1, 2, 3, 4, and 6. The court determined that the acts of the Orrs in connection with the counts for trespass, nuisance, and assault, were willful and malicious and that the Pheffers were entitled to punitive damages. As to counts 1 and 2, the court ordered the Orrs to “remove all encroachments, namely the lattice, the chain link fence, the chicken wire fence, the short brick wall and the shed where they encroach over the boundary line,” as determined in the Orrs’ survey, and quieted title in the Pheffers. The court awarded compensatory damages of \$3,500 for the encroachments. It awarded \$2,850 in compensatory damages for nuisance and \$3,000 in favor of Mr. Pheffer and against Mr. Orr for assault. The court imposed punitive damages in the amount of \$2,000 in favor of the Pheffers and against the Orrs, and \$8,000 in favor of Jeffrey Pheffer and against Steven Orr. The trial court denied the Orrs’ motion for a new trial, and this appeal followed.

The parties stipulated that the Pheffers and Orrs own contiguous properties which share a boundary. The evidence adduced at trial shows the following.

The Orrs purchased their residence in 1978, and the Pheffers purchased theirs in 1993. The short brick wall and the shed pre-dated the Orrs’ purchase of their home. The Orrs modified the short brick wall in 1980, removing a circular planter. At the sidewalk, the short brick wall is on the Orr property, .07 feet from the lot line. It lies at a slight angle, ultimately sitting on the boundary line, with about .21 feet of its width on the Pheffer side of the lot line. The Orrs placed lattice, a chain link fence, and a chicken wire fence on the Pheffer side of the lot line.

One side of the shed encroaches on the Pheffer property by .8 feet for its width, which is about nine feet. A building inspector for the City of Los Angeles,

Department of Building and Safety, testified that he issued an order to comply with regard to the shed in 1996, based upon, among other issues, its encroaching on the side yard set-back.

The Orrs installed a chain link security fence in 1982. It lies approximately .2 feet on the Pheffer side of the boundary line for its length.

The Orrs improperly trimmed a ficus hedge located on the Pheffer property. They also put pine needles in the Pheffer backyard and placed wet cement on the Pheffers' back flagstone stairs. The Pheffers spent \$100 to clean up the pine needles, and the steps were permanently damaged. The Pheffers repaired the steps, but testified that they intend to replace them because of the damage. The total cost for both is \$2,750.

The incident alleged as an assault occurred on the evening of November 11, 2000. Mr. Orr had placed a tree stump, approximately one foot long and one foot wide, at the sidewalk by the brick wall and on the Pheffer property. During the evening, Mr. Pheffer threw the stump onto the Orr driveway. Mr. Orr replaced the stump on the Pheffer side of the brick wall. Mr. Pheffer again threw it onto the Orr driveway. Mr. Orr later returned to his driveway, and stood on the sidewalk just over the property line. Mr. Pheffer at first stood on his front porch. When Mr. Orr picked up the stump, Mr. Pheffer said, "If you put that stump back there, I am going to ram it up your A." Mr. Orr put the stump on his own driveway. Mr. Orr said that the stump was on his property and was a "dog scenting post." Mr. Pheffer started walking toward Mr. Orr, asking Mr. Orr to show him that the stump was on Mr. Orr's property. When Mr. Pheffer was about five or 10 feet from Mr. Orr, Mr. Orr said: "That's it. You are done. You are dead. You are going down." Mr. Pheffer replied, "You're going to kill me over this piece of wood that you're putting in front of my house?" Mr. Orr responded, "You're dead." Then, Mr. Orr returned to his home. Mr. Orr made no move to make physical contact with Mr. Pheffer in any way.

Mr. Pheffer stated that he was in shock after the incident. He was worried because he knew that Mr. Orr had guns. He also remembered that Mr. Orr had grabbed his arm six months earlier and said he would get a gun. According to the reporter's transcript, Mr. Pheffer testified that he "did not feel immediate apprehension of offensive touching by Mr. Orr."¹ Mr. Pheffer sustained no physical distress as a result of the incident. He did not see a doctor, and did not incur severe emotional distress.

DISCUSSION

We review the trial court's factual findings for substantial evidence. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Except as otherwise provided by statute, no evidence is admissible except relevant evidence. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court is vested with wide discretion in determining the relevance of evidence, but has no discretion to admit irrelevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) We construe the pleading for the purpose of determining its effect liberally, with a view to substantial justice between the parties. (Code Civ. Proc., § 452.)

I. *Assault*

The right to recover damages in a civil action for assault and battery is generally governed by the rules of the criminal law. (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 386; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 346, p.

¹ The Pheffers contend that the transcript is inaccurate, and that Mr. Pheffer in fact testified that he was in immediate apprehension of offensive touching. The statement of decision states that Mr. Pheffer "was in reasonable apprehension of being harmed by Mr. Orr."

436.) In California, “[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (Pen. Code, § 240.) “Mere words, however threatening, will not amount to an assault.” (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 347, p. 437; Rest.2d, Torts § 31.) “An assault occurs whenever “[t]he next movement would, *at least to all appearance*, complete the battery.”” [Citation.]” (*People v. Williams* (2001) 26 Cal.4th 779, 786, original italics.) Moreover, the fear in which a plaintiff is placed at the time of an alleged assault is of *imminent* offensive or harmful contact, not fear of harm at some future time. (See *Lowry v. Standard Oil Co.* (1944) 63 Cal.App.2d 1, 6-7.)

In the present case, there is no evidence showing that Mr. Orr’s conduct was physically threatening toward Mr. Pheffer on November 11, 2000. He did not shake a fist or threaten Mr. Pheffer with the tree stump. Consequently, there is no support for the finding of assault. Mr. Pheffer asserts that earlier events caused him to be in apprehension: In 1995 or 1996, Mr. Pheffer and Mr. Orr got into an argument regarding the fence, and Mr. Orr called Mr. Pheffer “a f-ing New York Jew lawyer”; the Orrs dumped wet concrete onto the Pheffers’ steps in 1996; in April 2000, Mr. Orr grabbed Mr. Pheffer’s arm through the fence and told Mr. Pheffer that he had a gun in his house; the Orrs dumped pine needles onto the Pheffer property in 2001; and the Orrs improperly pruned the ficus hedge from time to time. None of these acts, however, occurred at the time of the alleged assault. The record shows that Mr. Pheffer walked toward Mr. Orr, and Mr. Orr retreated. Both men made threatening statements. Mr. Orr’s conduct does not support a finding of assault.

We therefore reverse the judgment as to count 6, and direct the trial court to enter judgment in favor of Steven Orr on count 6. Jeffrey Pheffer shall take neither compensatory nor punitive damages from Steven Orr with respect to that count.

II. *Encroachment*

A. **The shed**

The Orrs contend that the trial court's order requiring them to remove the shed is beyond the scope of the pleadings. We disagree.

Unlike the Complaint, the FAC does not contain an allegation that the shed is an encroaching structure. An amendment that eliminates a claim can be considered to remove that issue from a case. (See *Burge v. Krug* (1958) 160 Cal.App.2d 201, 206.) In the present case, however, the trial court concluded that the Orrs were on notice that the shed had not been deleted from the action and admitted evidence regarding the issue. The FAC supports this finding. It alleges that the Orrs maintained encroachments over the surveyed line. The attached survey shows the shed as an encroaching structure. As in the case of an attached contract, where "its recitals may serve as a substitute for direct allegations ordinarily essential to the pleading" (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 391, p. 488), the attached survey supplies the required notice.

We conclude that the FAC, liberally construed, alleges that the shed is an encroaching structure. The trial court did not abuse its discretion in admitting evidence and in making findings regarding the issue.

B. **Prescriptive Easement**

The Orrs contend that the trial court erred in failing to find the brick wall and chain link fence to be uses for which a prescriptive easement should be granted. We disagree. A prescriptive easement cannot be granted for a use which is tantamount to ownership of the subject property. (*Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564; *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1308.) While the amount of land affected by the brick wall and chain link fence is small, the structures do prevent the use of the portion of the Pheffer property on which they lie and any property on the

Orr side of the fences. The trial court properly found that no prescriptive easement had arisen.

C. Division Fence

The Orrs contend that the short brick wall is a division fence. A division fence between adjoining properties located on the property line is allowed by Civil Code section 841. (See *Meade v. Watson* (1885) 67 Cal. 591, 594 [fence erected along the boundary between two properties is a lawful fence].) Section 841, subdivision (1) provides that “[c]oterminous owners are mutually bound equally to maintain . . . [t]he boundaries and monuments between them.”

The statement of decision provides that the Orrs are ordered “to remove all encroachments -- namely, the lattice, the chain link fence, the chicken wire fence, the short brick wall and the shed within 60 days of the entry of judgment in this action.” The judgment orders the Orrs “to remove all encroachments, namely the lattice, the chain link fence, the chicken wire fence, the short brick wall and the shed where they encroach over the boundary line.”

The short brick wall pre-dates the Orrs’ purchase of their properties. It is located approximately on the property line between the parcels. The brick wall follows the lot line. At the sidewalk, it lies entirely on the Orr property, .07 feet (.84 inch) from the boundary. At its other end, it lies on the lot line and extends onto the Pheffer property .21 feet (2.52 inches). (The fence is approximately 40 feet long.) The Pheffers’ trial brief concedes that the brick wall “straddles the property line.” A division fence necessarily covers some portion of the land lying adjacent to the lot line. Any encroachment in the present case is de minimus.²

² Mr. Pheffer testified that he intended to build a six- to eight-inch thick block wall on the property line if the Orrs were required to remove the existing wall.

We conclude that the trial court erred in treating the short brick wall as an encroachment, and in ordering the Orrs to remove any portion of it. We therefore modify the injunctive order to delete that portion requiring the Orrs to remove the short brick wall to the extent that it encroaches over the boundary line.

DISPOSITION

The judgment is reversed as to count 6. The trial court is directed to enter judgment in favor of Steven Orr on count 6 and to set aside the compensatory and punitive damages awarded to Jeffrey Pheffer from Steven Orr on that count. The injunctive order is modified to exclude reference to the short brick wall -- the Orrs are not ordered to remove any portion of the short brick wall. In all other respects, the judgment is affirmed. The parties shall bear their own costs of appeal.

NOT FOR PUBLICATION.

_____. J.
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We concur:

_____ P.J.
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_____ J.
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